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MISCELLANEOUS

No. 94-1654

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GLEN HEISER and GEORGE SPENCER,
Petitioners,

v.

KEEN A. UMBEHR,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Planned Parenthood Federation of America, Inc. is the leading national voluntary health organization in the field of family planning.[1] Planned Parenthood and its 158 affiliates

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[1] The parties have consented to the filing of this brief.

engage in public education and advocacy of safe and legal access to all reproductive health services, and freedom of individual choice among those services, including abortion. The Court has recognized that Planned Parenthood's speech on these subjects is constitutionally protected, and that the public has a First Amendment right to receive this speech, which involves subjects of undeniable public concern. *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

Through its affiliates, Planned Parenthood operates approximately 925 clinics in 49 states which offer a wide range of medical services such as reproductive health services, including abortions, and cancer screenings services. Because of Planned Parenthood's well-known advocacy on the controversial question of abortion rights, it has been the target of various attempts to cancel contracts providing medical services, or to preclude it from competing in the bidding process for such contracts:

- In 1980, due in large part to Planned Parenthood's "abortion stance [which] has made itself unpopular," the Minnesota legislature precluded state funds from being used in any state contract to any nonprofit corporation which performs abortions. *Planned Parenthood of Minnesota v. Minnesota*, 612 F.2d 359, 361 (8th Cir. 1980), *aff'd*, 448 U.S. 901 (1980).

- In 1990, the City Council of Wichita, Kansas canceled a contract with Planned Parenthood to provide family planning services because Planned Parenthood advocated "certain unpopular ideals." *Planned*

Parenthood of Kansas v. City of Wichita, 729 F. Supp. 1282, 1288 (D. Kan. 1990).

- In 1993, following an active anti-Planned Parenthood campaign by opponents of abortion rights, the City Council of El Paso, Texas voted to deny a grant to Planned Parenthood to provide cancer screenings.

- In 1994, in Dutchess County, New York, Planned Parenthood was prevented by county executives from competing for a family planning services contract which it held for thirteen years, because of its views on abortion rights. *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2d Cir. 1995).

- Georgia legislators are engaged in continuing attempts to deny state funding to Planned Parenthood programs providing reproductive health services because of the legislators' opposition to Planned Parenthood's advocacy of sexuality education in schools, as well as its public position on abortion rights.

Consistent with the experience illustrated by these examples, Planned Parenthood expects to face again denial of the opportunity to hold or compete for government contracts as a direct result of its speech advocating abortion rights.

Denial of access to governmental funds would significantly impair Planned Parenthood's ability to provide services

through its clinics. These clinics are generally operated with a combination of government grants, private donations, and patient fees. They provide services and counselling to many patients who are ineligible for government medical assistance; they charge their clients according to their abilities to pay. The amount of government funding varies from as much as 70% of clinic operating funds to as little as 0.1%. Typically, combined federal and state funding provides about 25% to 30% of the clinics' operating funds. Loss of these funds would severely harm Planned Parenthood's ability to continue to provide basic services.

Because the First Amendment does not permit government to use its power to coerce its citizens to adhere to a set position on matters of public concern, *amicus* urges the Court to hold that government contractors—like the general public and like government employees—are protected by the First Amendment from retaliation for engaging in political debate.

STATEMENT OF THE CASE

Amicus adopts respondent's statement of the case.

SUMMARY OF ARGUMENT

There is no real question that the First Amendment protects the speech of government contractors. Neither precedent nor constitutional theory justifies the categorical exclusion of government contractors, as a class, from First Amendment protection. Point I. The more serious issue involves the appropriate degree of First Amendment protec-

tion for such speech. Because the only difference between contractors and ordinary citizens is the government contract, government has no legitimate interest in restricting any contractor speech unless that speech directly and materially impairs performance of the contract. The government has no legitimate interest in prohibiting government contractors from speaking about matters of public concern merely because the government disagrees with their views. Retaliation against contractors for speech that does not impede performance of the contract therefore fails to further any legitimate government interest. Point II.

ARGUMENT[2]

The abuse of government power at issue in this case poses a direct threat to the most basic First Amendment values. The constitutional *carte blanche* assumed by the petitioner County Commissioners is an extraordinarily powerful weapon for silencing those with whom the government disagrees. If the government can use its control over a government contract to punish a speaker because of his views on matters of public concern, it can suppress that viewpoint. But members of the public do not lose their First Amendment rights merely because they enter into government contracts. The First Amendment protects all citizens from government overreaching intended to punish speech and compel ideological orthodoxy.

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[2] The only questions presented by this case involve the applicability and degree of First Amendment protection for speech by government contractors. Retaliation against government contractors based on their speech may also violate the Equal Protection Clause or other constitutional provisions.

I. THE FIRST AMENDMENT PROTECTS GOVERNMENT CONTRACTORS FROM RETALIATION FOR SPEECH ON MATTERS OF PUBLIC CONCERN.

1. The Court has denied First Amendment protection to a few narrowly confined categories of *speech*.[3] But it has consistently refused to deny First Amendment protection to categories of *speakers*. "The identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 8 (1986). "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). *See also Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516 (1995).

Therefore, categorically denying First Amendment protection to government contractors as a class would constitute a radical departure from settled First Amendment jurisprudence. The break would be particularly unwarranted because it would permit government to retaliate against a government contractor precisely because government did not like what the contractor was saying. The core purpose of the First Amendment is to prevent government from silencing its critics by suppressing or discouraging expression of particular

[3] *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words).

viewpoints. *FCC v. League of Women Voters of California*, 468 U.S. 364, 383-84 (1984).[4]

There is no jurisprudential or empirical reason to categorically exclude government contractors, and only government contractors, from the protection of the First Amendment. It has long been the law that although government may award or deny benefits—such as contracts—for many reasons, it may not do so for reasons that violate constitutional rights. Indeed, the Court has squarely held that exercising First Amendment rights is *not* a legitimate reason for denying government benefits, including public employment, tax exemptions, unemployment benefits, and welfare payments. *Perry v. Sinderman*, 408 U.S. 593, 597-98 (1972).

2. The rationale of the Court's decisions in *Rust v. Sullivan*, 500 U.S. 173 (1991), and *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), confirms the Court's earlier ruling in *Perry* that speech does not lose First Amendment protection simply because it is uttered by beneficiaries of government programs. In *Rust*, the Court emphasized that the speech restrictions at issue there (specifically,

[4] The First Amendment prohibits government from proscribing, punishing, or financially burdening speech, especially when the governmental action is motivated by governmental disapproval of the ideas expressed. *E.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 115 (1991). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. 310, 319 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

prohibitions on counselling, referral, or provision of information about abortions) were permitted because they applied to programs, not to persons:

> here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.

500 U.S. at 196. The Court distinguished the "unconstitutional conditions" cases by noting that they "involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197 (emphasis added).

Similarly, in *League of Women Voters*, the Court struck down a regulation barring all editorializing on radio stations that received any public funds. The regulation violated the First Amendment because it prohibited recipients from using their own funds to speak on one subject if they used federal funds to speak on other subjects. 468 U.S. at 400. Thus, even where government can exercise some control over speech that it directly funds, that control cannot be extended to all speech of speakers who accept any of that funding.

3. For nearly three decades the Court has consistently recognized that the First Amendment protects the speech of the class of speakers most like independent government contractors: public employees. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *Connick v. Myers*, 461 U.S. 138, 145-47 (1983); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). Like ordinary citizens, government employees enjoy the right to debate issues of "political, social, or other concern to the community." *Connick*, 461 U.S. at 146.[5] Indeed, employee speech makes a special contribution to the central goal of the First Amendment "to protect the free discussion of government affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), because "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994) (plurality opinion).

Government contractors should enjoy at least the same protection as government employees. Indeed, government employees work pursuant to a contract of employment and, in that sense, are government contractors. The government has no legitimate interest in plenary, uncircumscribed control of the speech of thousands of companies and millions of

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[5] *Amicus* believes there should be no categorical denial of First Amendment protection for the speech of government contractors, even if the speech is *not* of public concern. It is not necessary to decide that question, however, in order to decide this case, because respondent's speech was undeniably a matter of public concern.

individuals who happen to contract with the government or otherwise receive government funds.[6]

4. There is no basis for the argument that contractors do not require First Amendment protection because they do not depend on government funds to the extent employees depend on their paychecks. Although proposed—without evidence—by some lower courts, *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), this argument is empirically unsound and legally insupportable. At minimum, the argument is premised on a faulty understanding of the relevant facts. An analysis of the top twenty-five federal contractors shows that nearly 40% of them obtained more than half of their 1994 revenues from contracts with the United States government. Another 20% obtained at least 25% of their revenues from government contracts.[7] If these contractors were to lose such a substantial portion of their revenues, the effect on these companies would be quite as serious as a government employee losing her job. Indeed, such a loss of revenue would likely

[6] The federal government alone reported nearly 19 million separate contract actions during fiscal year 1994 involving almost 200 billion dollars. Federal Procurement Data Center, *Federal Procurement Report* (Fiscal Year 1994 through Fourth Quarter) at 2 (Feb. 7, 1995). State and local governments enter into countless additional contracts affecting millions of individuals, so it is clear that the "class" of government contractors is large, wide-spread, and diverse.

[7] The list of top contractors comes from the *Federal Procurement Report* (Fiscal Year 1994 through Fourth Quarter) at page 14. The Report also shows the dollar amount paid to each of the top contractors. *Amicus* determined the percentage of revenue by comparing that dollar amount to the total revenues reported in each company's 10-K form filed with the Securities and Exchange Commission.

result in layoffs that would affect untold numbers of individual employees. And many smaller contractors may be even more vulnerable. Several Planned Parenthood affiliates, for example, receive nearly 70% of their operating funds from combined government sources, and the average affiliate receives 25-30%. The loss of these funds would likely mean severe cutbacks in services, or closing the clinics' doors.

Moreover, many contractors have expertise that is useful *only* to the government. Loss of government contracts would put them out of business, and their employees out of work. The same is not necessarily (or even likely) true for government employees, many of whom have alternatives to government employment because they have skills that are equally valuable in the private sector.

More important, even if the factual circumstances were otherwise, the argument is fatally inconsistent with the Court's First Amendment jurisprudence. First Amendment protections have never depended on whether the degree of financial burden imposed by governmental restrictions is limited or devastating.[8] Any burden on speech that is more than *de minimis* triggers First Amendment review. The Minnesota tax on newspaper ink was held unconstitutional even though it was scarcely expected to drive the affected newspapers out of business. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). And the federal prohibition against editorializing by educa-

[8] The argument that constitutional protection hinges on economic dependency was specifically rejected by this Court in the context of a Fifth Amendment claim in *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973).

tional broadcasters was struck down without regard to whether the broadcasters were wholly dependent on federal subsidies. *League of Women Voters of California*, 468 U.S. at 400 (1984) (government funding of some public stations was as little as 1%).

By the same token, the extent to which the First Amendment protects government employees does not vary depending on the degree of their economic dependency on the government. If a part-time government employee were independently wealthy or made more money at a second, non-government job, he would not consequently lose any of his First Amendment protection as a government employee. Thus, whether a government contractor is wholly dependent on government contracts, or whether she could easily replace the government business with private business, is irrelevant to whether her speech as a government contractor is entitled to First Amendment protection. The First Amendment is a restraint on the power government may wield to suppress speech, not a gift conferred on the basis of need.

5. The distinction drawn by some lower courts between government employees and contractors in patronage cases provides no support for denial of First Amendment protection to contractor speech in this case. *See, e.g., Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986). Those courts concluded that the government's interest in preserving the two-party system and encouraging active participation in the process of elective government justified partisan preferences in selecting contractors. *Id.* at 672-74. Retaliating against contractors because of their speech—which is at issue here—is different. Such retaliation does not further any legitimate government

interest in a two-party system or in encouraging political involvement.

Furthermore, the basis for these lower court decisions is at best questionable. This Court has never held that the interests asserted in defense of patronage—preserving the two-party system and encouraging participation in elections—justify terminating government contractors based on their party affiliation.[9] The only exception this Court has ever suggested to the constitutional rule against patronage-based employment decisions is that party affiliation may be a legitimate factor in selecting individuals for *policy-making* jobs. *Elrod*, 427 U.S. at 368. To the extent the interest in effective government justifies this limited exception for high-level employees, it may justify the same limited exception for contractors that perform equivalent policy-making functions. But it does *not* justify an unbounded exception for *all* government contractors.[10]

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[9] At most, the Court has approached the constitutional issues raised by patronage cautiously, one by one. Thus, in *Elrod v. Burns*, 427 U.S. 347, 353 (1976), and *Branti v. Finkel*, 445 U.S. 507, 513 n.7 (1980), the Court found dismissal of a government employee based on party affiliation unconstitutional. Although the Court observed in those cases that only dismissal was at issue, the Court has since then extended the principle articulated in those decisions to "several related political patronage practices." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 65 (1990).

[10] To the extent lower courts have found patronage-based actions against government contractors justified, they have relied on this Court's suggestion that "[p]reservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms." *Horn*, 796 F.2d at 674 (citing *Elrod*, 427

(continued...)

6. Finally, petitioners' contention that categorical denial of First Amendment protection for speech by government contractors is justified because government needs broad authority to terminate government contracts if contractors are not fulfilling their contractual obligations, is meritless. No one disputes the government's right to terminate a contract if the contractor is not performing the contract. The different issue presented by this case is whether the government can terminate a contract or otherwise retaliate on the basis of the contractor's speech when the speech is *not* likely to impair performance of the contract.[11]

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[10] (...continued)
U.S. at 368). The instances actually cited by the Court, however, were campaign finance reform and the Hatch Act—not termination of government contracts based on party affiliation.

[11] Petitioners' suggestion (Pet. Br. 30-32) that First Amendment protection for speech by contractors would open the floodgates to litigation and would force courts to probe the motivations of government officials whenever they terminate contracts (or refuse to consider particular bids) is a straw man. Although the constitutional contours of such a challenge are well-established, contractors rarely challenge decisions to terminate, or not to grant, contracts based on speech unrelated to contract performance. And in those rare cases, there is no reason to believe it will be more difficult for courts to determine the true motivation for termination of contracts than it is to determine the true motivation for termination of an employee's job.

II. THE FIRST AMENDMENT GUARANTEES FULL PROTECTION FOR CONTRACTOR SPEECH ON MATTERS OF PUBLIC CONCERN THAT DOES NOT IMPEDE PERFORMANCE OF THE CONTRACT

1. For the reasons discussed above, it is clear that government contractors do not surrender their First Amendment rights at the procurement officer's door. The real issue is not whether the First Amendment applies to speech by government contractors, but how it applies.

In the government employment context, the Court has held that the "extra power [to regulate speech] the government has in this area comes from the nature of the government's mission as employer." *Waters v. Churchill*, 114 S. Ct. at 1887. Similarly, the government's only legitimate interest in withholding or terminating contracts based on speech comes from the government's position as purchaser of goods or services.[12] Were it not for the contract, government contractors would have the same rights to speak as any other citizen. Thus, the only conceivable basis for government regulation of contractor speech (when

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[12] At issue here is the *additional* interest the government has in regulating the speech of a contractor, as opposed to the speech of a member of the public, because of the contract relationship. A government contractor has no immunity because of his relationship with the government. If the government can take action against an ordinary citizen for her speech, it may act against a government contractor for the same speech. Thus, regardless of the contract, government could regulate speech if it had a compelling need to do so—in order to protect national security, for example—and did so in a narrowly tailored way.

government could not regulate the same speech by a member of the public) is the government's interest in full and effective performance of the contract.

The lesson of the government employee cases is that the government's ability to restrict employee speech (when it could not limit the same speech by a member of the public) is limited by its interests as employer. Recognizing that government as employer has interests that would justify "restraints on the *job-related* speech of public employees that would be plainly unconstitutional if applied to the public at large," the Court balances the interest of the employee, as citizen, and the interest of the government, as employer. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1012 (1995). The critical issue is these cases is whether the speech impedes the government's legitimate interests as employer.

Thus, in *Pickering*, the speech of a governmental employee (a teacher) did *not* justify adverse governmental action because the teacher's statements, which criticized the School Board, were "neither shown nor can be presumed to have in any way either *impeded* the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572-73 (emphasis added). Because the speech did not impede performance, the Court concluded that the school administration's interest "in limiting teachers' opportunities to contribute to public debate is *not significantly greater than its interest in limiting a similar contribution by any member of the general public.*" *Id.* (emphasis added) *See also NTEU*, 115 S. Ct. at 1013 n.11

("our *Pickering* cases only permit the Government to take adverse action based on employee speech that has adverse *effects* on 'the interest of the State, as an employer.'") (emphasis in original).[13]

The burden on the government to justify restrictions of contractor speech should be greater than in the case of employee speech because the government generally has *less* legitimate interest in regulating speech by contractors than in regulating speech by employees. Effective performance of the contract is defined largely by the terms of the contract while an employee's performance is judged by less precise standards. For this reason, several governmental interests in regulating employee speech lose much of their force in the government contract context. For example, one justification for limits on employee speech is that the government can speak only through its employees, and the public is therefore likely to impute employee speech to the government. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). But the public is much less likely to impute the speech of government contractors to the government. For example, if a big defense contractor lobbies for increased defense spending, the public does not perceive that it speaks for the government. Another justification in the employee context is the government's

[13] This rule is often expressed as a requirement that the speech be *related* to the employment. In *NTEU*, for example, the Court struck down regulations because they restricted speech that was not related to government employment. *NTEU*, 115 S.Ct. at 1017-18. However, speech can *relate* to government employment and still not impair any legitimate interest in that employment, as *Pickering* makes clear. Thus, the real test is whether the speech will impede performance of the job or of the contract. In general, however, speech that is unrelated to the job or contract is very unlikely to impede performance of the job or contract.

interest in an efficient, harmonious workplace. *Pickering*, 391 U.S. 569-70. Again, this interest has less relevance to government contracts because contractor employees do not usually perform them in a government-run workplace. Given the lack of these kinds of government-as-employer concerns in the government contractor cases, the test for determining whether adverse government action against contractors violates the First Amendment must be tied specifically to the only legitimate interest the government has: performance of the contract.

2. For these reasons, in any case in which the government takes adverse action against a government contractor based on speech, the government must show that the speech directly and materially impairs performance of the contract. Any more indirect or attenuated relationship between the speech and contract performance would allow government undue latitude to suppress speech simply because government disagrees with the views expressed. The burden is always on the government to justify adverse action based on speech by articulating the governmental interest—here, contract performance—and demonstrating how the speech impedes that interest. *NTEU*, 115 S. Ct. at 1013.[14]

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[14] The appropriate protection for contractor speech on matters of public concern that *does* impede performance of the contract is a difficult question that need not be resolved in this case. However, the fact that contractor speech does impair performance of the contract does not necessarily justify any adverse governmental action. Instead, in our view, the question then is whether the adverse governmental action is narrowly tailored to serve the government's interest in contract performance. *See McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1519 (1968).

3. More limited protection for contractor speech would give government undue power to enforce political orthodoxy upon a huge number and range of citizens. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry*, 408 U.S. at 597. Diminished First Amendment protection for such speech would therefore give the incumbent administration the power to coerce unwilling support for its own positions, chilling the right to disagree with or even discuss the official line. By conditioning contracts explicitly or implicitly on support for its position, government could exercise frightening power.

The practical effect would be wide-spread and substantial because of the enormous number and diversity of government contractors and other beneficiaries of government programs. *See* p. 10, n.6, *supra*. Moreover, government is increasingly contracting out services it has traditionally provided through employees, such as the administration of schools and prisons, thus increasing the business it does with contractors.

Furthermore, these effects would not be confined to any clear class of "government contractors." "[F]ew large-scale endeavors are today not supported, directly or indirectly, by government funds—from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious." *Board of Trustees of Leland Stanford Junior University v. Sullivan*, 773 F. Supp. 472, 478 (D.D.C. 1991). The language and purpose of the First Amendment provide no basis to distinguish between award or termination of (1) public employment (which involves a

contract of employment whether written or oral), (2) a government contract not relating to employment, and (3) the distribution of other benefits by the government, such as licenses, tax exemptions, welfare and unemployment benefits, and zoning permits.[15]

For example, if the Department of Agriculture decided it was in the public interest to grow more soybeans, it could implement that policy in a number of ways: by employing farmers to grow soybeans on federal land; by contracting with farmers to grow soybeans; by leasing private farmland on which employees or contractors would grow soybeans; by giving subsidies to farmers who grow soybeans; or by giving a tax break to farmers who grow soybeans. If the Department of Agriculture has broad power to refuse to allow a farmer to compete for a contract to grow soybeans because he had written a letter to the editor of his weekly newspaper criticizing the United States' position on Bosnia, or even U.S. agricultural policies, it could also refuse to lease his farmland or to grant him subsidies or a tax break for the same reason. This "invitation to government censorship wherever public funds flow" would take the door opened by *Rust* "off its hinges." *Stanford University*, 773 F. Supp. at 478.

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[15] The principle that government may not deny benefits based on speech applies to a wide variety of benefits, including: tax exemptions, *Speiser v. Randall*, 357 U.S. 513 (1958); unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963); welfare payments, *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); and public employment, *Perry v. Sinderman*, 408 U.S. at 597.

CONCLUSION

Because speech by a government contractor that does not impair performance of the contract is fully protected by the First Amendment, that speech may not constitutionally be the basis for a government decision adverse to the speaker. The Court should therefore affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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